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In The

Supreme Court of the United States

October Term, 1996

TOM GRIMMETT, AS TRUSTEE FOR THE BANKRUPTCY ESTATE OF VINCENT SIRAGUSA AND JOANNE SIRAGUSA,

Petitioners,

v.

PATRICIA L. BROWN, PATRICIA L. BROWN, LTD., AND BECKLEY, SINGLETON, DELANOY, JEMISON & LIST, CHTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S ANSWERING BRIEF

PETER M. ANGULO*
DON F. SHREVE, JR.
RAWLINGS, OLSON, CANNON, GORMLEY & DESRUISSEAUX
301 E. Clark Avenue,
Suite #1000
Las Vegas, Nevada 89101
(702) 384-4012

Counsel for Respondents Patricia L. Brown and Patricia L. Brown, Ltd.

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the majority of Circuit Courts are correct in holding a civil RICO action accrues when a plaintiff knows, or reasonably should know she has been injured – without regard to whether the plaintiff knows the injury was part of a pattern of racketeering activity.

2. Whether the Ninth Circuit properly held a cause of action can accrue under civil RICO without the precise amount of damages, if any, becoming concretely established.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv, v
CASES	iv
RULES AND STATUTES	vi
OTHER AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	7
ARGUMENT	8
I. PETITIONERS' 1994 LITIGATION WAS PROPERLY BARRED BY THE STATUTE OF LIMITATIONS	8
A. GENERAL STANDARDS REGARDING STATUTES OF LIMITATIONS	8
B. A CIVIL RICO ACTION ACCRUES WHEN A PARTY KNOWS OR SHOULD HAVE KNOWN OF THE INJURY	10
C. PETITIONER'S CAUSE OF ACTION IS ALSO BARRED UNDER THE "PATTERN" ACCRUAL METHOD	20
II. PETITIONERS' INJURIES WERE PRESENT, IF AT ALL, AT THE TIME THE 1989 COMPLAINT WAS FILED	22

TABLE OF CONTENTS – Continued

	Page
A. PETITIONERS WERE AWARE OF THE EXTENT OF POTENTIAL DAMAGE BY MAY OF 1989	23
B. PETITIONER SOUGHT MORE THAN MERELY EQUITABLE RELIEF IN MAY OF 1989	28
C. PETITIONER SIRAGUSA HAS FULLY RECOVERED ANY LOSS SHE MAY HAVE SUSTAINED	28
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Agency Holding Corp. v. Maley-Duff & Assoc., Inc., 43 U.S. 143 (1987) 8, 11, 12, 13, 15

Aldabe v. Adams, 81 Nev. 280, 402 P.2d 34 (1965) 19

Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067 (2d Cir. 1993) 26

Baldwin v. Loew's Inc., 312 F.2d 387 (7th Cir. 1963) 16

Bankers Trust Co. v. Rhoades, 859 F.2d 1096 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1009 (1989) 13, 14, 23

Bivens Gardens Offices Bldg. v. Barnett Bank, 906 F.2d 1546 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991) 22

Board of Regents v. Tomanio, 446 U.S. 478 (1980) 8

Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984) 11

Delaware State College v. Ricks, 449 U.S. 250 (1980) 10

Eberle v. Anaheim, 901 F.2d 814 (9th Cir. 1990) 13

Fleischluer v. Feltner, 879 F.2d 1290 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990) 29, 30

Grimmett v. Brown, 75 F.3d 506 (9th Cir. 1996), *cert. granted*, 116 S. Ct. 2521 (1996) 6, 20

H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989) 17

Hapaniewski v. City of Chicago Heights, 883 F.2d 576 (7th Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990) 26

Hargraves v. Brackett Stripping Machine Co., 317 F. Supp. 676 (E.D. Tenn. 1970) 9

TABLE OF AUTHORITIES – Continued

Page

Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) 26

Hawkins v. Joshua Barney's Lessee, 5 Pet. (30 U.S.) 457 (1831) 9

Jablon v. Dean Witter & Co., 614 F.2d 677 (9th Cir. 1980) 10

Keystone Ins. Co. v. Houghton, 863 F.2d 1125 (3rd Cir. 1988) 18

La Porte Const. Co. v. Bayshore Nat'l Bank, 805 F.2d 1254 (5th Cir. 1986) 15

Mamer v. Apex. R.E. & T., 852 F. Supp. 870 (E.D. Mo. 1994), *aff'd*, 59 F.3d 780 (8th Cir. 1995) 26

McCool v. Strata Oil Co., 972 F.2d 1452 (7th Cir. 1992) 15, 16

Oscar v. University Students Co-Op Ass'n, 965 F.2d 783 (9th Cir. 1992), *cert. denied*, 506 U.S. 1020 (1992) 29

Pangrazzi v. United States, 511 F. Supp. 648 (E.D. Pa. 1981) 10

Pocahantas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211 (4th Cir. 1987) 14

Rodriguez v. Banco Central, 917 F.2d 664 (1st Cir. 1990) 12, 13

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 10, 16, 23, 26, 27, 30

Siragusa v. Siragusa, 108 Nev. 987, 843 P.2d 807 (1992) 3, 24, 26, 29

State Farm Mutual Automobile Ins. Co. v. Ammann, 828 F.2d 4 (9th Cir. 1987) 12, 27

TABLE OF AUTHORITIES – Continued

Page

United States v. Kubrick, 444 U.S. 111 (1979) ... 9, 10, 15

Vigman v. Community Nat'l Bank & Trust Co., 635 F.2d 455 (5th Cir. 1981) ... 15

Wilcox v. Commissioner, 848 F.2d 1007 (9th Cir. 1988) ... 13

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) ... 13

RULES AND STATUTES

18 U.S.C. § 1961 ... 8

18 U.S.C. § 1962 ... 14, 27

18 U.S.C. § 1962(c) ... 10, 23, 27

18 U.S.C. § 1964(c) ... 10, 23, 28, 29

18 U.S.C. § 1968 ... 8

NRS 11.190 ... 19

Federal Rule of Civil Procedure 12(b)(6) ... 10

OTHER AUTHORITIES

113 Cong. Rec. 18,007 (1967) ... 11

OPINIONS BELOW

Respondent PATRICIA L. BROWN and PATRICIA L. BROWN, LTD., (hereinafter "BROWN") concurs in the presentation of Opinions Below contained in Petitioners' Opening Brief on the merits.

JURISDICTION

Respondent PATRICIA L. BROWN and PATRICIA L. BROWN, LTD., (hereinafter "BROWN") concurs in the presentation of Jurisdiction contained in Petitioners' Opening Brief on the merits.

STATUTES INVOLVED

Respondent PATRICIA L. BROWN and PATRICIA L. BROWN, LTD., (hereinafter "BROWN") concurs in the presentation of Statutes Involved contained in Petitioners' Opening Brief on the merits.

STATEMENT OF THE CASE

Petitioners incorrectly indicate this matter was only considered as a Motion to Dismiss and, therefore, the facts asserted by Petitioners must be deemed true in analyzing the correctness of the Ninth Circuit's decision. The decision by Judge Philip M. Pro and the affirming decision by the Ninth Circuit Court of Appeals relied not only on averments in the Complaint but also upon matters outside of that Complaint. To this extent, therefore, this matter was treated and analyzed as one for summary

judgment.[1] It is not, therefore, appropriate to focus exclusively on the statements of the Complaint. A fair reading of the Ninth Circuit Court of Appeals' decision indicates it honestly reflects the relevant facts which this Court needs to accurately ascertain the propriety of that decision. Accordingly, that factual statement is adopted by BROWN.

Essentially, Vincent and JOANNE SIRAGUSA divorced in 1983. At that time, Dr. Siragusa owned a one-third interest in a cardiology practice called the Heart Institute of Nevada ("HIN"); with two other doctors (Paul Hereen and John Bowers) who held the remainder equally.[2] One of the terms of the divorce involved JOANNE SIRAGUSA releasing her one-half community property interest in Vincent's regular ownership share in these various medical practices in exchange for certain monthly payments.

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[1] At no time did Petitioners object to the incorporation of evidentiary materials or factual assertions involving subjects exceeding the confines of the original Complaint which was dismissed. Therefore, Petitioners are deemed to have waived any arguments regarding supplementing the facts in the Complaint with this external material. Furthermore, to the extent these facts were asserted without the presence of documentary support, the refusal by Petitioners to lodge timely objections to that material should be deemed an effective waiver of any argument those facts were untrue or that Petitioners did not concede those facts were properly portrayed.

[2] In addition, Vincent Siragusa owned a 1/3 ownership interest in the Heart Institute Cath Lab and 27.55% in the Heart Institute property.

In 1987, Vincent defaulted; accordingly, JOANNE secured a state court judgment for the full amount of her interest.[3] Before JOANNE could collect on her judgment, however, Vincent filed for bankruptcy and claimed he no longer owned any interest in those medical practices.[4] On May 4, 1988, Vincent's property settlement obligations were discharged by the bankruptcy court, however his alimony was not. *Siragusa v. Siragusa*, 108 Nev. 987, 843 P.2d 807, 809 (1992).

The assertion that Vincent Siragusa no longer owned an interest in the properties was supported by letters written by BROWN as counsel to the various Heart Institute medical practices. JA 198-99 at ¶ I. Specifically, BROWN asserted Vincent was in default, that he was given an opportunity to cure the default or be forced to

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[3] Petitioners assert this Judgment was for an amount in excess of 1.4 million dollars in the 1989 bankruptcy complaint. Joint Appendix (hereinafter "JA") at p. 198, ¶ E. That ruling occurred on September 10, 1987. *Id.*

[4] The 1989 bankruptcy complaint avers Vincent Siragusa objected to the finding by the Domestic Relations Referee and brought the matter before the Eighth Judicial District Court for the State of Nevada on November 5, 1987. JA at 198, ¶ F. The Court adopted the Referee's findings, reduced the marital payment arrearages to judgment, and stayed enforcement for judgment of one week to allow Vincent Siragusa time to consult with counsel regarding undertaking the appeal. *Id.* On November 10, 1987, the Petition for bankruptcy was filed. *Id.* at ¶ G. On January 13, 1988, when he filed his schedules and Statement of Affairs, the position taken in those documents was that he no longer owned any interest in the Heart Institute entities and, therefore, JOANNE SIRAGUSA'S medical payment obligations had become unsecured.

sell his interests, that in August of 1987 the sale of his interests was forced by his partners, and that the sale conveyed his interests in the medical practices to his partners free of Petitioner SIRAGUSA's lien. *Id.* In the 1989 Complaint, Petitioners asserted the amount for which the property was sold was inadequate. *Id.* at ¶ J. Furthermore, they asserted the partnership agreement was "purportedly amended" by Vincent and his partners on June 25, 1987, to add the very forced sale on default provisions under which the debtor was "purportedly" given notice of default and under which the sale of Vincent's interests were forced. JA 201 at ¶ K(1).[5] Petitioners observed the events comprising the default referenced in the Default Notice were different from those contained in the concurrent correspondence from BROWN to Vincent. *Id.* at ¶ K(2). It was further asserted (in 1989) the purported basis for the default as identified by BROWN in a letter dated June 26, 1987 was untrue. *Id.* It was also asserted the August 1987 dates on which the sales were made were inconsistent with the Partnership Amendment and Default Notices. *Id.* at ¶ K(3).[6]

On May 2, 1989, JOANNE filed an adversary proceeding in Vincent Siragusa's bankruptcy (No. BK-S-87-3085-LBR). JA 186. While BROWN was not specifically named, the summum bonum of that Complaint

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[5] The clear tenor of the 1989 Complaint is that Petitioners questioned whether any of those counts had ever occurred or were honestly incurred.

[6] The basis for this last assertion was premised on the fact that as of September 4, 1987 BROWN represented no structural changes had taken place and she was negotiating with JOANNE's counsel to protect Vincent's interest in the Heart Institute entities. JA 202.

averred the named doctors and their business organizations had conspired to cheat JOANNE out of her share in Vincent's interests in the practices.[7] *See, e.g.,* JA 214-15.

Specifically, she claimed the activities which led to filing the bankruptcy constituted "a common plan and design to defraud [her] out of her rights under the Divorce Instruments" and the defendants had "actively participated in, aided, abetted, ratified and adopted for their own benefit the actions of the other defendants in furtherance of the Conspiracy." *Id.* The events allegedly proving the existence of this conspiracy repeatedly included the involvement of BROWN in preparing the documents and transmitting the information – without alleging direct liability for said involvement. JOANNE alleged because of secret side agreements that existed, Vincent continued to make as much money as he did before. She asserted other persons (whose identities were presently unknown) were also responsible for the matters which occurred. JA 189. In the 1989 Bankruptcy Complaint, she specifically articulated she had been concretely damaged in amounts which exceeded ten thousand dollars ($10,000.00) and was entitled to punitive damages. JA 215.

In the 1993 RICO Complaint, Petitioners reiterated the racketeering activity, in which BROWN had been allegedly involved, included the purported termination of Vincent's medical practice interests, the transfer of

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[7] By filing that Complaint, JOANNE effectively put all parties in that bankruptcy proceeding – including the bankruptcy trustee – on notice of these allegations.

HIN's medical practice to Cardiology Associates of Nevada (hereinafter "CAN"), the filing of Vincent's bankruptcy petition and providing back-dated and fraudulent documents supporting the bankruptcy petition. JA 35-36. The Complaint asserted multiple fraudulent schemes existed which had, as their purpose, the obtaining of lucrative financial rewards of the medical practices at the expense and to the detriment of JOANNE SIRAGUSA (Petitioner), the bankruptcy estate and other victims.[8] This goal was allegedly achieved by purportedly terminating Vincent's medical practice interests; transferring HIN's medical practice to CAN; filing Vincent's bankruptcy; and providing backdated and otherwise fraudulent documentation regarding Vincent Siragusa's bankruptcy petition and the condition of his medical practice interests. JA 35-36. Thus, the allegations of the 1993 Complaint mirrored those contained in the 1989 petition – as the Ninth Circuit rightly noted. *See Grimmett v. Brown*, 75 F.3d 506, 509 (9th Cir.), *cert. granted*, 116 S. Ct. 2521 (1996). The only notable difference between the two Complaints was the November 1993 Complaint specifically named BROWN and claimed she was now the "mastermind" behind the entire scheme. *Id.*

As a result of this activity, Petitioners asserted their injuries had geometrically increased to an amount in excess of 6 million dollars ($6,000,000.00). *See, e.g.*, JA 71, 102, 106, 111. Against this factual backdrop, the decision of the Ninth Circuit was appropriately made.

[8] The other victims are, of course, not parties to this action nor were they named-parties in the Complaint. Accordingly, their interests are not relevant to a consideration of the matters at issue. *Id.*

SUMMARY OF THE ARGUMENT

Two polar accrual methods have been set before this Court in the context of a civil RICO action. The majority rule, espoused by the Ninth Circuit, most clearly accords with fundamental principles of fairness and equity – while ensuring the remedial purposes of RICO are met. It requires a plaintiff to timely prosecute for damages based on discovery of injury without requiring concurent knowledge of a pattern. In this case, that accrual point occurred, at the latest, over four years before the instant complaint was filed.

Even under the minority rule, Petitioners knew, or should have known, of the existence of a pattern of alleged racketeering activity designed to injure them by May of 1989 – over four years before this complaint was filed. Thus, under either approach, the claims are time-barred and were properly dismissed.

Petitioners not only had knowledge of the proscribed alleged behavior and the associated pattern, they also knew of the injury by May of 1989. The property settlement was discharged the year before due to behavior the May 1989 adversary proceeding monickered as fraudulent. It was a sum certain. Petitioner sought compensatory and punitive damages in that 1989 proceeding. Therefore, any damages were not speculative in nature so as to warrant any delay in the accrual of the RICO claim.

With definite damages by May of 1989, under either accrual approach, the matter was time-barred when this complaint was filed over four years after the May 1989 adversary proceeding was filed. Accordingly, the Ninth Circuit's decision must be upheld.

ARGUMENT

I. PETITIONERS' 1994 LITIGATION WAS PROPERLY BARRED BY THE STATUTE OF LIMITATIONS

It is not disputed this Honorable Court, in *Agency Holding Corp. v. Maley-Duff & Assoc., Inc.*, 483 U.S. 143 (1987), held a four-year statute of limitations applied to litigation promised upon the Racketeering and Corrupt Influences Organization Act, 18 U.S.C. §§ 1961-68. The only question before this Court – in the present context – is whether knowledge of a pattern is required before the cause of action can properly accrue. It is respectfully submitted, in this case, Petitioners' cause of action would have been barred under the utilization of either method of calculating when a RICO violation accrues.

A. GENERAL STANDARDS REGARDING STATUTES OF LIMITATIONS

Statutes of limitations "have long been respected as fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. 478 (1980).

> Statutes of limitations, which are "found and approved in all systems of enlightened jurisprudence," [ ] represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified

> period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them."

United States v. Kubrick, 444 U.S. 111, 117 (1979) (citations omitted). Indeed, statutes of limitations "have been part of the law of every civilized nation from time immemorial." *Hargraves v. Brackett Stripping Machine Co.*, 317 F. Supp. 676, 682 (E.D. Tenn. 1970).

> [N]o class of laws is more universally sanctioned by the practice of nations, and the consent of mankind. . . . Such laws have frequently passed in review before this court; and occasions have occurred in which they have been particularly noticed as laws not to be impeached on the grounds of violating private right. What right has anyone to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights? All the reasonable purposes of justice are subserved, if the courts of the state have been left open to the prosecution of suits for such a time as may reasonably raise a presumption in the occupyer [sic] of the soil that the fruits of his labor are effectually secured beyond the chance of litigation.
>
> . . . .
>
> It is not to be questioned, that laws limiting the time of bringing suit, constitute a part of the *lex fori* of every country: they are laws for administering justice; one of the most sacred and important of sovereign rights and duties: and the restriction which must materially affect both legislative and judicial independence.

Hawkins v. Joshua Barney's Lessee, 5 Pet. (30 U.S.) 457, 466 (1831). Therefore, if an injured party fails to assert a claim

in a timely manner, the cause of action, irrespective of merit, will be forfeited forever. *Pangrazzi v. United States*, 511 F. Supp. 648, 649 (E.D. Pa. 1981). The question of whether a statute of limitations applies is a matter of law and may be decided pursuant to a Fed. R. Civ. Pro. 12(b)(6) motion. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980).

The proper focus is on the *time* of the discriminatory or injurious acts, *not* the time when the *consequence* of the acts becomes most painful. *Delaware State College v. Ricks*, 449 U.S. 250, 258 (1980). Each injurious act begins the running of the statute of limitations at the time of its *occurrence*, as opposed to when the plaintiff becomes aware of her or his legal rights regarding the same. *Kubrick*, 444 U.S. at 122. It is respectfully submitted the policy followed by the majority of federal circuits, including the Ninth Circuit, of holding a cause of action for RICO accrues at the time the injured party knows of or reasonably should have discovered the injury most closely comports with these concerns. Since Petitioners knew of the "injury" by May of 1989, at the latest, this action was time-barred when filed in November of 1993.

B. A CIVIL RICO ACTION ACCRUES WHEN A PARTY KNOWS OR SHOULD HAVE KNOWN OF THE INJURY

The elements of a civil RICO claim are simple enough. They require an individual be injured through the conduct of an enterprise by a pattern of racketeering activity (known as "predicate acts") causing injury to business or property. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985); 18 U.S.C. §§ 1962(c) & 1964(c). In analyzing

the RICO statute of limitations question, this Honorable Court specifically referenced anti-trust law and the Clayton Act to guide its decision-making process. *Agency Holding*, 483 U.S. at 151; *see also* 113 Cong. Rec. 18,007 (1967) (introducing the forerunner to RICO as an *addition* to the Sherman Act instead of an independent act). This Court also noted RICO bears a similarity to 42 U.S.C. § 1983 – the civil rights statute. 483 U.S. at 149. It follows reason, therefore, to apply an accrual method similar to that utilized under these Acts in determining when a Civil RICO cause of action accrues.

Utilizing these guidelines, the accrual method employed by the Ninth Circuit most clearly conforms with the accrual methods utilized by these other acts. In a pre-*Agency Holding* case, the Ninth Circuit Court of Appeals first addressed the issue of when, under RICO, a cause of action accrued. In *Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984), the Circuit held the mere existence of a conspiracy did not generally postpone accrual of causes of action arising from the conspirator's separate wrongs; hence, it was "the wrongful act, not the conspiracy, which [was] actionable in a civil case." 732 F.2d at 1433. Noting RICO did not provide a civil statute of limitations, the Court adopted the general federal rule that a statute of limitations begins to run when the plaintiff knew or had reason to know of the injury which was the basis for the action. *Id.*

> We see no reason here to depart from the general rule. Although RICO does not specifically outlaw conspiracies to violate the substantive provisions of the statute, 18 U.S.C. § 1962(d), RICO's civil remedy section permits suit by persons injured in their business or property, 18

> U.S.C. § 1964(c). The civil remedy provision's focus upon injury as opposed to existence of a conspiracy suggested the normal federal rule on accrual should apply to civil RICO actions alleging conspiracy.

Id. Accordingly, it held the RICO claim was barred since it was based on the same facts as a § 1983 conspiracy claim which was also time-barred.

Since *Agency Holding*, the Ninth Circuit has continued to maintain that position on accrual. In *State Farm Mutual Automobile Ins. Co. v. Ammann*, 828 F.2d 4 (9th Cir. 1987), the Circuit re-affirmed its position regarding when a cause of action under RICO accrued. Then-Circuit Judge Kennedy concurred in the decision – *noting the accrual rule utilized was the same found in § 1983 and anti-trust actions*. 828 F.2d at 5. He further stated that position allowed a new cause of action to be brought when a separate and distinct injury was incurred as the result of additional acts specifically proscribed in the RICO provisions. *Id.*[9]

Other Circuits have allied themselves with the position correctly articulated by the Ninth Circuit. Each has predicated its analysis on § 1983 or anti-trust law. For example, in *Rodriguez v. Banco Central*, 917 F.2d 664 (1st Cir. 1990), then-Chief Judge Breyer offered an opinion setting forth the position of the First Circuit on when a cause of action under RICO accrued. Justice Breyer claimed to start "[t]he statute running when a plaintiff

[9] This position is known as the doctrine of separate accrual.

knew or should have known of his injury seems consistent with the language of RICO's 'treble damage' provision." 917 F.2d at 666. This accrual rule was similar to the Clayton Act rule of accrual and to the accrual concepts governing actions for fraud. *Id.* (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971)).

Justice Breyer expressed his concern about ensuring the concept of statute of limitations had meaning. 917 F.2d at 667. Concerned that applying any other rule would result in extended periods of time from the time the plaintiff was first aware of injuries – even if no predicate act had occurred – he articulated the resulting litigation would be antithetical to express concerns about bringing RICO actions before memories of witnesses faded or evidence was lost. *Id.* (citing *Agency Holding*, 483 U.S. at 156).[10] Hence, he held the First Circuit would, from that time forward, adhere to the accrual standards articulated by the Second Circuit in *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1009 (1989). *Id.*

In *Bankers Trust Co.*, the Court acknowledged the accrual issue had been the subject of wrestling by the judiciary. To end the dispute between district courts within the Second Circuit, the Court took the position "a

[10] He noted, however, the presence of fraudulent concealment could result in tolling the statute of limitations. 917 F.2d at 668. Notably, while Petitioners argued fraudulent concealment applied in this case before the Ninth Circuit, they have not re-visited that argument in the Opening Brief and are deemed to have abandoned that argument on appeal. *See Eberle v. Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990); *Wilcox v Commissioner*, 848 F.2d 1007 (9th Cir. 1988). This argument will not, therefore, be discussed in any further detail.

cause of action to recover damages based on that injury [a violation of 18 U.S.C. § 1962] accrues to plaintiff at the time he discovered or should have discovered the *injury*." 859 F.2d at 1102 (emphasis added). Two major sources supported its opinion.

First, there was the plain language of the statute. 859 F.2d at 1102. The focus was not upon the time of the RICO violation but on when the plaintiff actually suffered *injury* to the business or property from the violation. 859 F.2d at 1103. The second source was found, by analogy, in the Clayton Act itself. The Court noted a cause of action under the Clayton Act accrues and the statute of limitations begins to run when a defendant commits an antitrust violation that injures a plaintiff's business. 859 F.2d at 1104. Absent an additional period for tolling, the action for the injury must be brought within four years from the date the events occurred and plaintiff became aware of same. *Id*. By utilizing the separate accrual rule articulated in the Ninth Circuit by Justice Kennedy, the Second Circuit held the remedial purposes of RICO were best satisfied while maintaining an integrity to the underlying purposes for statutes of limitations under this accrual method. Accordingly, each time a plaintiff discovered or should have discovered an injury caused by a separable violation of § 1962, a new cause of action arose as to that injury. The plaintiff must, at that point, bring the action within four years of the accrual to recover damages for the specific injury. 859 F.2d at 1104.

In *Pocahantas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987), the Fourth Circuit joined the First, Second and Ninth Circuits in holding the statutory period begins to run when a plaintiff knows or should know of the injury that underlies the cause of action. The

Fifth Circuit (pre-*Agency Holding*) also indicated the statutory period would begin to run under similar conditions. *La Porte Const. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254, 1256 (5th Cir. 1986). This was because:

> The knowledge, whether actual or constructive, which an aggrieved party must have for the purpose of the commencing of the running of a statute of limitations is merely that of "the facts forming the basis of this cause of action," . . . not that of the cause of action itself.

Vigman v. Community Nat'l Bank & Trust Co., 635 F.2d 455, 459 (5th Cir. 1981) (citations omitted).

Finally, the Seventh Circuit has taken up the standard of her sister Circuits in holding a RICO claim accrues upon knowledge of an injury – not a requirement that a pattern be present. *McCool v. Strata Oil Co.*, 972 F.2d 1452 (7th Cir. 1992). In considering this matter, the Seventh Circuit noted utilizing the discovery principle was uncontroversial. 972 F.2d at 1465.[11] That Court aligned itself with this Court's standards when it focused its inquiry on the discovery of *injury* – not the discovery of a cause of action. *Id*. (citing *Kubrick*, 444 U.S. at 123). It further adopted a "separate accrual" rule to civil RICO claims. In

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[11] There must be a pattern of racketeering before the RICO claim accrues and that requirement could delay accrual until after the plaintiff discovered the injury – assuming no pattern existed at the time the injury was identified. *Id*. *McCool* also discussed the potential for equitable tolling to delay the running of the statute of limitations while a victim diligently investigates the possible existence and extent of a pattern of racketeering. *Id*. However, before this Court, Petitioners have not made equitable tolling an issue for consideration. Therefore, this, too, will not be addressed in any more detail.

other words, as to each separate injury, a new cause of action under RICO would arise and a suit to recover for that injury must be brought within the limitations period. *Id.* The Court was careful to note, however, the new cause of action would accrue only when there was a new instance of wrongful conduct and a new injury; "[d]ifferent injuries flowing from the same conduct are usually not actionable in separate lawsuits." 972 F.2d at 1465 n. 10.[12]

It justified its actions on the grounds that this Court made it clear RICO injuries flowed from individual predicate *acts*, not from the pattern itself. *Id.* (citing *Sedima*, 473 U.S. at 495-97). Its analysis was founded upon weighing the concerns a plaintiff has in bringing successive suits, the defendant's interest in repose, and the judicial system's interest in conducting trials based on fresh evidence. Accordingly, it found itself in-line with the position taken by the Ninth Circuit which this Court has cause to review on this Writ.

The public policy supporting the decision of the Ninth Circuit has been clearly articulated by these other courts and in the Ninth Circuit's decision which this Court is presently reviewing. The position is in direct accord with accrual concepts under the Clayton and Civil

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[12] The Court distinguished a civil RICO claim on the grounds that "each wrongful act that causes injury is a new cause of action, a new foul; in criminal RICO, on the other hand, the defendant is being punished for his participation in the pattern as a whole." 972 F.2d at 1466. The Court noted it also had used that rationale to distinguish between civil actions and criminal prosecutions under the Clayton Act – upon which RICO was modeled. *Id.* (citing *Baldwin v. Loew's Inc.*, 312 F.2d 387, 390 (7th Cir. 1963)).

Rights Acts. It fully comports with the articulated policies undergirding limitation periods. It provides a definite accrual point for both plaintiff and defendant. In short, it is the better-reasoned approach which fairly balances both parties' interests.

This is in direct contrast to the position which Petitioners seek to foist upon this Court. Succinctly, the concern with extending RICO accrual until a time that a party knows, discovers, or reasonably should have discovered, a *pattern* of racketeering is that it allows too much leeway to the plaintiff to the clear detriment of the defendant without good cause. It encourages sloth rather than diligence; complacency rather than an attentive protection of one's interests.

For example, under the argument espoused by Petitioners, an individual may know today they have been injured by a party's action. Nevertheless, they are "unsure" whether a pattern exists.[13] While the injured

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[13] In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), this Court recognized a failure on the part of Congress and the Courts to develop a meaningful concept of "pattern". 492 U.S. at 236. Holding evidence of prior events may not be sufficient unless the required elements of continuity plus relationship can be shown, this Court acknowledged:

> The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists.

492 U.S. at 243. Hence, while the concept of "injury" is concrete, the concept of "pattern" is not. To utilize the "pattern"

party may be able to eventually find other similar events occurring to unrelated individuals, one may still not be *sure* sufficient continuity and relationship exists to create a "pattern." Accordingly, the plaintiff may continue to refrain from filing an action until the amorphous point at which she becomes convinced in her own mind both relationship and continuity are present. None could reasonably dispute this dilemma. A dispositive motion would be fruitless. Thus, the plaintiff has unlimited time to file an action. The end result is the plaintiff must bring forth witnesses and evidence ranging over countless years to prosecute for injuries not freshly received – even though she knew of her injury long before – simply because she was unsure of the "pattern" element. The defendant meanwhile, is effectually left without an otherwise viable defense. Such a result is the unquestioned antithesis of the stated purpose behind statutes of limitations.[14]

More importantly, should this Court adopt accrual premised upon knowledge of a pattern of racketeering

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requirement as an accrual point for statute of limitations analysis introduces into that analysis an element which is so vague it fogs the point at which a party knew, or reasonably should have known, the pattern existed – rendering the limitations period a nullity in all but the most obvious cases.

[14] Although not a major focus of inquiry by either side, this same problem is amplified by the Third Circuit's "last predicate act" rule. *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125 (3rd Cir. 1988). Under that rule, a party can be injured today and wait for ten years for another act to occur which could constitute a "pattern". In the interim, memories fail, witnesses and evidence are lost, and, if the second event never occurs, the cause of action for the wrongful act is forever destroyed. Such a danger, too, is in stark contrast to the purposes for RICO.

activity, it could result in losses of valid causes of action. A party who is injured today by an act of, say, mail fraud might begin to investigate the "pattern" requirement necessary to bring a RICO action. The plaintiff may forestall litigating on the known injury in the desperate hope she can reap the benefits of civil RICO if only a pattern can be found. When the plaintiff ultimately determines no pattern exists, it may often be too late to prosecute her independent claims of individualized injury for that act of mail fraud. Thus, the defendant who engaged in mail fraud would not only be benefitted, but the plaintiff who has been wrongfully injured would have lost her action simply because she hoped to grasp the gold ring of RICO rather than actively and appropriately seek prosecution and restitution of the injuries she incurred once she knew, or reasonably should have known, she was so injured.

It is respectfully submitted there is no harm in requiring a plaintiff today – upon discovery of injury or at a time when, in the exercise of reasonable diligence, those injuries should have been discovered – to bring a suit for restitution of said injuries. The limitations periods for fraud or conspiracy, in Nevada, must be brought within three years. NRS 11.190; *Aldabe v. Adams*, 81 Nev. 280, 402 P.2d 34 (1965). If plaintiff brings the action within three years and begins, diligently, to do discovery, certainly she should be able to unearth within a year, evidence of a pattern sufficient to give rise to a claim under RICO. The Complaint could be timely amended within the limitations period.

Thus, the position articulated by the Ninth Circuit most appropriately addresses the concerns of RICO. It focuses on the injury – not the pattern. It encourages

plaintiffs to act quickly to protect their interests. It provides for separate accrual of new injuries based on independent and new acts in furtherance of a conspiracy to defraud or to engage in a RICO enterprise and even allows, as the *Grimmett* decision noted, the potential for equitable tolling in unique circumstances where such evidence could not otherwise come forth. It is the quintessential compromise; protecting the rights of the plaintiff and the defendants, while ensuring the claim will not become stale and the matter will be litigated while the evidence is still fresh and memories have not faded. It should, therefore, be sustained.

C. PETITIONER'S CAUSE OF ACTION IS ALSO BARRED UNDER THE "PATTERN" ACCRUAL METHOD

Even if this Court were to adopt the argument that civil RICO accrual requires not only knowledge of the injury but also discovery of a "pattern", it does not help Petitioners' cause whatsoever. As has already been established before this Court, in 1989 (when the Complaint in Bankruptcy Court was filed) Petitioners asserted JOANNE had been injured as a result of a conspiracy and, further, specifically articulated the various independent acts of fraud which she claimed combined to cause her injury. Even though she may not have known all the actors in the alleged conspiracy, she certainly knew it existed.

She further knew the acts were related. She knew they were continuous and were designed specifically to defraud her and the bankruptcy estate of funds to which she perceived she was entitled. Hence, she already knew

the pattern of racketeering activity had occurred which she thought was designed to cause her harm and which allegedly did, in fact, cause her harm.

Even the "pattern" discovery accrual rule could not alter the dismissal of her November 1993 litigation because Petitioner still was on notice of her injuries and the method by which they were procured. The latest date at which Petitioner could be heard to say she was unaware of those injuries was May of 1989 because she specifically articulated them in the bankruptcy proceeding.[15] Aware of the pattern, she had until May of 1993 to file suit. Why she chose to wait until November of 1993 is unexplained in the record. However, her decision has rendered her position moot. Her claim was, and is, time-barred.

The articulated public policy and concerns identified in the first two sections of this Brief are clearly seen in this case. By 1989 – within two years after the bankruptcy petition was first filed and one year after her interest in the properties was discharged – Petitioner was allegedly aware a conspiracy had taken place and that its intent was to defraud her. Assuming, for the moment, she did not know a pattern rising to the level of a RICO violation existed, had she filed her Complaint within three years

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[15] More likely, the accrual date for this event should go further back to 1987 when her estranged spouse filed bankruptcy. It is inconceivable that Petitioner – a community interest property holder with her husband who was fully aware of the scope and extent of his assets – would have believed her ex-husband could rapidly devolve into bankruptcy. Therefore, in 1987 when the bankruptcy petition was filed, Petitioner was originally put on notice something was amiss.

and aggressively pursued discovery, it is inconceivable she would not have been able to allege both continuity and relationship existed with these acts sufficient to give rise to a RICO violation. Thus, under the Ninth Circuit's approach, she had one year of court-ordered and mandated discovery tools at her disposal to aid her in determining whether a RICO violation existed.[16]

That she chose not to avail herself of these tools or to act expeditiously to protect her interests, is not a reason for this Court to alter the accrual rule or reverse the position articulated by the Ninth Circuit. More importantly, while not knowing all the actors or even the full breadth of the supposed conspiracy, she certainly had enough information to put her on notice of a potential pattern of racketeering sufficient to give rise to accrual under the minority position espoused by Petitioners. *See Bivens Garden Offices Bldg. v. Barnett Bank*, 906 F.2d 1546, 1553-54 (11th Cir. 1990), *cert. denied*, 500 U.S. 910 (1991). Therefore, it is respectfully submitted the Ninth Circuit's position must be affirmed.

II. PETITIONERS' INJURIES WERE PRESENT, IF AT ALL, AT THE TIME THE 1989 COMPLAINT WAS FILED

A review of Petitioners' injury arguments appear to indicate JOANNE SIRAGUSA's injury cannot be determined until the conclusion of the adversarial bankruptcy

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[16] Actually, had she been truly concerned about her interests, she could have filed on those claims in 1989 when she filed her adversarial proceeding. All the alleged elements were present. This would have given her four years – assuming a May 1989 accrual point – to discover the "pattern."

proceedings in this matter. Petitioners attempt to persuade this Court that before a RICO cause of action exists and its statute of limitations begins to run, a potential plaintiff's damages must be certain in amount. Accordingly, she asserts her injuries are not "concrete" and the statute of limitations does not begin to run until she definitely knows the amount of loss she will sustain. This logic is flawed for several reasons, as shall be demonstrated below.

A. PETITIONERS WERE AWARE OF THE EXTENT OF POTENTIAL DAMAGE BY MAY OF 1989

Petitioners are correct in stating that for a RICO cause of action to exist, there must be "injury to business or property". *Sedima*, 473 U.S. at 496. However, Petitioners have set forth no case law which would suggest the precise *amount* of injury must be known. The cause of action exists and the statute of limitations begins to run when the injury is known, without the requirement that the injured party know the full amount. 18 U.S.C. §§ 1964(c) & 1962(c); *Sedima*, 473 U.S. at 496; *Bankers Trust Co.*, 859 F.2d at 1100.

However in this particular case, this is an inconsequential distinction. For, clearly, at the time of filing the adversarial complaint in Bankruptcy Court on May 2, 1989, JOANNE SIRAGUSA was well aware of the alleged existence of her injury, as well as the amount of injury suffered. As referenced in the factual section of both the Petition and the instant Response, JOANNE's claim arises out of her perceived property interest in her ex-husband Vincent Siragusa's one-third joint venture interest in a

medical practice. The gyrations of the divorce proceedings immediately before the filing of the adversarial complaint in Bankruptcy Court in May of 1989 illustrate JOANNE SIRAGUSA's knowledge of when she became aware of her injury, as well as the dollar amount thereof.

On September 23, 1983, a decree of divorce was entered in the District Court, Clark County, Nevada, which incorporated the property settlement agreement of Petitioner and Vincent Siragusa. *Siragusa v. Siragusa*, 108 Nev. 987, 843 P.2d 807, 808 (1992). That agreement provided in pertinent part that Vincent Siragusa would make alimony payments of $3,000.00 per month for 60 consecutive months, commencing 15 days from the date of the agreement (August 19, 1983), until either all of the 60 payments were made, JOANNE SIRAGUSA remarried, or either party died. *Id.* The agreement also provided Vincent Siragusa would purchase JOANNE SIRAGUSA's community property interest in Vincent Siragusa's medical practice for the sum of $1,250,000.00, to be paid over a period of 15 years in increasing monthly installments. *Id.*

By mid-1987, Vincent Siragusa had fallen into default on both the alimony and the property settlement obligations. 843 P.2d at 809. On November 5, 1987, the district court had orally announced it would enter judgment in favor of JOANNE SIRAGUSA in the amount of $1,300,000.00 in property settlement arrearages. *Id.* On November 10, 1987, Vincent Siragusa, who was solvent, filed a voluntary Chapter 7 petition for bankruptcy, *under which his property settlement obligation was discharged on May 4, 1988*, but his alimony obligations were not. *Id.*

Clearly, JOANNE SIRAGUSA was aware of the full value of her property interest in Vincent Siragusa's medical practice on September 23, 1983, when she agreed to that value in their divorce proceedings as a property settlement. Furthermore, on November 5, 1987, JOANNE entered a state district court in Nevada and requested the court enter a judgment in her favor in the amount of $1,300,000.00 in property settlement arrearages. Lastly, she was certainly aware of her damage and the amount thereof at the time the bankruptcy court discharged Vincent's property settlement obligation on May 4, 1988.

Petitioner was aware of her injury approximately 12 months before filing her adversarial proceeding and should have filed her RICO complaint at that time. She did not and must endure the poison for making that ill-advised decision.

A review of Petitioners' adversarial complaint filed in May of 1989 (JA 186) quickly reveals JOANNE SIRAGUSA was aware she had suffered an injury from the allegedly fraudulent reorganization of the medical entities. The amount of loss was certain because the definite sum of the property obligation had already been discharged. Petitioners could have brought a RICO complaint in federal district court at that time, thereby preserving the statute of limitations, but chose not to do so. Thus, the dismissal by the Federal District Court of the November, 1993 complaint (filed four and one-half years after the adversarial proceeding) was appropriate and should be upheld by this Court, as it was by the

Ninth Circuit.[17] *See, Hapaniewski v. City of Chicago Heights*, 883 F.2d 576 (7th Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990).

For Petitioners to tell this Court that JOANNE SIRAGUSA's claim is not ripe because she is uncertain as to the amount of her damage is preposterous. The above facts, as found in the matter of *Siragusa v. Siragusa, supra*, clearly indicate, in May of 1989, if not before, she knew that she was injured, in what amount, and by whom.

As this Court has long held, "if a defendant engages in a pattern of racketeering activity in a manner forbidden by 18 U.S.C. § 1962(a)-(c), and the racketeering activities injure a plaintiff in his business or property, the plaintiff has a claim under 18 U.S.C. § 1964(c)." *Sedima*, 473 U.S. at 495. "[A] defendant who violates § 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured." *Sedima*, 473 U.S. at 496-97; *see Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 389 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985). Where a plaintiff alleges each element of a violation, the compensable injury necessarily is the harm caused by the predicate act sufficiently related to constitute a pattern – for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed under

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[17] The presence of an ongoing bankruptcy proceeding or the institution of an adversary proceeding before the bankruptcy court has *no* effect on the limitations period; hence, no tolling argument could be advanced. *See Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067 (2d Cir. 1993); *Mamer v. Apex R.E. & T.*, 852 F. Supp. 870 (E.D. Mo. 1994), *aff'd*, 59 F.3d 780 (8th Cir. 1995).

the circumstances delineated in 18 U.S.C. § 1962(c), "an activity which RICO was designed to deter." Any recoverable damages occurring by reason of a violation of § 1962 will flow from the commission of the predicate acts. *Sedima*, 473 U.S. at 497.

A review of the complaint filed in the adversarial proceeding in bankruptcy court in May of 1989, compared to that filed in the federal district court in November of 1993, illustrates that both contain allegations of the predicate acts, and that she was injured as a result thereof. In May of 1989, Petitioners were well aware of the predicate acts which allegedly resulted in the perceived injury. Hence, the statute had clearly run by the time Petitioners filed their case in the federal district court on November 24, 1993.[18]

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[18] Even if this Court was to apply a separate accrual rule which states that for each injury caused by a RICO violation, the limitation period accrues for that injury when a plaintiff knew or should have known of the injury, this would be of no assistance to Petitioners. *See Ammann*, 828 F.2d at 5.

In this case, a review of the instant Petition, together with their briefs filed in the lower courts, illustrates that Petitioners allege Respondents continued to engage in RICO violations well after May of 1989. However, Petitioners have not alleged a separate or independent injury resulting from the continued acts. Rather, Petitioners alleged in the November 1993 Complaint, one continuing pattern of racketeering activity which allegedly injured Petitioners' claim to her property interest in the medical practice of Vincent Siragusa. Thus, allegedly constituting a single scheme with one purpose: to divest Petitioner SIRAGUSA of her interest in the medical practice.

B. PETITIONER SOUGHT MORE THAN MERELY EQUITABLE RELIEF IN MAY OF 1989

Petitioners attempt to demonstrate the premature nature of JOANNE SIRAGUSA's RICO claim at the time she filed her initial adversarial proceeding in bankruptcy court because she only sought equitable relief. However, what Petitioners have failed to disclose to this Court is that she not only sought equitable relief, but *compensatory damages* against all Defendants in a sum in excess of $10,000.00, according to proof; an award for *punitive damages* against all Defendants in a sum in excess of $10,000.00, according to proof; and an award to Plaintiff of *reasonable fees and costs* against all Defendants for prosecuting that action. JA 215-16. Clearly, JOANNE SIRAGUSA believed she was injured at least to an extent in excess of $10,000.00 against each Defendant, coupled with an award of punitive damages by May 2, 1989. Thus, Petitioners' claim of prematurity for her RICO cause of action due to her request for equitable relief must be summarily discounted by this Court.

C. PETITIONER SIRAGUSA HAS FULLY RECOVERED ANY LOSS SHE MAY HAVE SUSTAINED

18 U.S.C. § 1964(c) provides that any person injured in his business or property by reason of a violation of RICO may recover treble damages and attorney's fees. While RICO is to be "liberally construed", it is well-established not all injuries are compensable under this section. A showing of "injury" requires proof of concrete financial loss, and not merely "injury" to valuable and

intangible property interests. *Oscar v. University Students Co-Op Ass'n*, 965 F.2d 783, 785 (9th Cir. 1992), *cert. denied*, 506 U.S. 1020 (1992); *Fleischluer v. Feltner*, 879 F.2d 1290, 1299-1301 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990) (plaintiffs under § 1964(c) entitled to recover only for money they paid out as a result of racketeering activity).

In this particular case, JOANNE SIRAGUSA'S property interest in Vincent Siragusa's medical practice was in the amount of $1,300,000.00 (as of November 5, 1987). *Siragusa*, 843 P.2d at 808. That is the total amount of alleged injury. It was, and is, both definite and concrete.

However, as a result of the adversarial complaint filed in the bankruptcy proceeding in May of 1989, Petitioner SIRAGUSA received settlement funds from John Bowers, M.D. (a one-time joint venturer in the medical practice with Vincent Siragusa whom ultimately ended up with the entire medical practice) in the approximate amount of $1,400,000.00.[19] Also, Vincent Siragusa settled with JOANNE out of the adversarial proceeding for the approximate sum of $160,000.00. This makes Petitioners' settlement figure from two of the several Defendants named in the bankruptcy adversarial proceeding an estimated $1,560,000.00. Thus, she recouped more than her alleged property interest – valued at $1,300,000.00. Any injury she may have had as a result of the alleged conduct of the various Defendants involved in the instant RICO action allegedly acting in concert with those settling Defendants named in the adversarial proceeding no longer exists. Accordingly, Petitioners' injury claim under

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[19] This fact was referenced in Co-Respondent Beckley, Singleton's Answering Brief before the Ninth Circuit, filed on November 14, 1994 (JA 7) at pp. 30-31.

RICO cannot now be maintained against the Defendants named in the federal RICO Complaint, as JOANNE SIRAGUSA has been fully compensated. *See Fleischluer*, 879 F.2d at 1299-1301; *Sedima*, 473 U.S. at 496.

CONCLUSION

For the foregoing reasons, Respondents respectfully ask this Court to sustain the decision of the Ninth Circuit in this case and hold that this litigation was time-barred at the time it was filed in November 24, 1993.

Respectfully submitted this 15th day of October, 1996.

RAWLINGS, OLSON, CANNON,
GORMLEY & DESRUISSEAUX

PETER M. ANGULO, ESQ.
DON SHREVE, JR., ESQ.
301 East Clark Ave., #1000
Las Vegas, NV 89101
Attorneys for Respondents
Pat Brown & Pat Brown, Ltd.